No. 15,655

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRGIL D. DARDI, Individually and as Executor of the Estate of Umberto Dardi,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

OPINION BELOW.

No opinion was rendered by the District Court. The findings of fact and conclusions of law appear in the record at pp. 43-49.

JURISDICTION.

This appeal involves a suit filed by the United States on December 15, 1954, in the United States District Court for the Northern District of California

to collect income and excess profits taxes assessed against the Mission Company, a corporation for the years 1942 and 1943. In addition to that company, the defendants named were Virgil D. Dardi, individually and as executor of the estate of Umberto Dardi, and Olga Paula as trustee of trusts for Joseph Dardi and Mary Claire Elevita Dardi. (R. 1-8.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1345. After filing answers, the defendants filed a motion for judgment in the pleadings on the ground that this action is barred by the statute of limitations but such motion was denied in an order entered on April 13, 1956. (R. 18-19.) After the hearing, judgment was entered on June 11, 1957 against the Mission Company and also against Virgil D. Dardi, individually and as executor. (R. 50.) The action was dismissed as to Olga Paula. (R. 50.) Notice of appeal to this Court was filed on July 8, 1957. (R. 51.) This Court has jurisdiction under 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether this suit is barred by the statute of limitations applicable to the collection of income tax from a transferee. This depends upon whether the waiver which was executed by the appellant as president of the transferor-corporation also tolled the period of limitation for collection from the appellant in his capacity as transferee.

STATUTE INVOLVED.

Internal Revenue Code of 1939:

Sec. 276. Same—Exceptions.

* * *

(c) *Collection after assessment.* — Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(26 U.S.C. 1952 ed., Sec. 276.) * * *

Sec. 311. Transferred Assets.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a tax-

payer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * *

(26 U.S.C. 1952 ed., Sec. 311.)

STATEMENT.

The facts as found by the District Court are, so far as pertinent here, as follows (R. 43-48):

The Mission Company was incorporated under the laws of California in January, 1941, but used other names until November, 1942. It filed income tax returns for the calendar year 1942 and for the period from January 1, 1943, to June 30, 1943. These returns were filed by Virgil D. Dardi as president and Umberto Dardi as vice president. (R. 44.)

Income and excess profits taxes were assessed against the Mission Company as follows (R. 44):

Year	Tax		Amt. Assessed	Post War Credit	Amt. Owed
1942	E.P.		$8,117.06	$811.71	$ 7,305.35
1942	I.T.		14.50		369.96
		Int.	3.47		
		DVEP	283.99		
		Int.	68.00		
1943	E.P.		6,305.04	630.50	5,674.54
1943	L.T.		726.05		2,633.75
		Int.	130.28		
		DVEP	1,507.01		
		Int.	270.41		
					$15,983.60

The assessment list pertaining to the above tax liabilities was signed by the Commissioner of Internal Revenue on October 10, 1947, and received by the Collector of Internal Revenue at San Francisco on October 13, 1947, on which date a lien arose on all property and rights to property of the Mission Company. This assessment was within the applicable statute of limitations for assessment of such taxes as duly extended by Virgil D. Dardi as president of the Mission Company. Notice and demand was made on the Mission Company on October 17, 1947, but none of the above taxes has been paid. (R. 45.)

Waivers which were executed by Virgil D. Dardi as president of the Mission Company on October 21, 1952, extended the time of collection of the above tax liabilities by distraint or by proceedings in court until December 31, 1956. Notices of federal tax liens were filed pursuant to Section 3672 of the Internal Revenue Code of 1939 for the tax liabilities asserted herein in the County of San Francisco, California, on January 9, 1948, in the amount of $19,491.39. (R. 45.)

No waiver extending the time of collection of the above tax liabilities by distraint or by proceedings in court has ever been executed by Virgil D. Dardi, either individually or as executor of the estate of Umberto Dardi. (R. 45.)

On June 30, 1943, Virgil D. Dardi and Umberto Dardi each received the assets of the Mission Company and assumed the liabilities of the corporation as shown on its books at that date. On the same day they

formed a partnership known as the Mission Company, to which they transferred the assets which they had received and the liabilities which they had assumed from the Mission Company. This partnership thereafter continued to operate the business known as the Cigar Box Restaurant. (R. 46.)

At the time of the above transfer of the assets of the Mission Company, they had a total value as evidenced by the books of the corporation and of the partnership of $38,137.65 and liabilities amounted to $22,311.65. (R. 46.)

On April 30, 1944, Virgil D. Dardi did transfer his one-half interest in the partnership known as the Mission Company to Eugene Engle for the sum of $150,000 evidenced by a promissory note to be paid as follows (R. 46):

$27,900 on or before December 31, 1944;
$30,000 on or before December 31, 1945;
$30,000 on or before December 31, 1946;
Balance on or before December 31, 1947.

The transaction was a bona fide transaction entered into in good faith by both parties. (R. 46.)

Eugene Engle paid Virgil D. Dardi the sum of $27,900 in 1944, in payment of the first installment due on the note, and Virgil D. Dardi reported the receipt of this payment in his individual federal income tax return for the year 1944. (R. 47.)

On or about January 1, 1945, Eugene Engle transferred his 50% partnership interest in the Mission Company to John Clifton Ernst, as trustee for Mary

Claire Dardi and Joseph Dardi, the two minor children of Virgil D. Dardi. This transfer was evidenced by a trust indenture which was duly executed by the parties. Pursuant to this trust indenture, the trustee made payments to Virgil D. Dardi in the amounts set forth below, and Virgil D. Dardi reported the receipt of such payments in his individual federal income tax returns for the respective years in which the payments were made (R. 47):

1945	$21,169.06
1946	$38,175.00

On or about May 6, 1947, Virgil D. Dardi executed a release, discharging Eugene Engle from any further liability under his note of April 30, 1944. (R. 47.)

Umberto Dardi died on or about April, 1948, and Virgil D. Dardi is executor of the estate of Umberto Dardi. (R. 47.)

On the basis of these facts the District Court reached the following conclusions of law (R. 48-49):

1. That the Mission Company, a corporation, is liable to the United States for the amount of $15,983.60, plus accrued interest at a rate of 6 per cent thereon from October 17, 1947, until the date of payment.

2. That the agreement of October 21, 1952, between the Mission Company and the Commissioner of Internal Revenue, extending the time for collection of the above tax liabilities, extended the time for proceeding in court against Virgil D. Dardi individually and as executor of the estate of Umberto Dardi, and this action is therefore not barred by the statute of

limitations as to Virgil D. Dardi, either individually or as executor of the estate.

3. That the transfer of the assets of the Mission Company to Virgil D. Dardi and Umberto Dardi rendered the taxpayer, the Mission Company, insolvent and unable to pay its taxes.

4. That neither Virgil D. Dardi nor Umberto Dardi paid any consideration to the Mission Company for the assets, except for the assumption of the liabilities of the Mission Company.

5. That Virgil D. Dardi and Umberto Dardi did each become liable to the United States as transferees of the Mission Company in the amount of $7,913, the net value of the assets received.

Accordingly, judgment was entered by the District Court against Virgil D. Dardi as an individual in the amount of $7,913 and against him as executor of the estate of Umberto Dardi for the same amount. Judgment was entered against the Mission Company for $15,983.60, plus interest. (R. 50.)

SUMMARY OF ARGUMENT.

It is admitted that the taxpayer here owes taxes for 1942 and 1943, and that it became insolvent when it subsequently transferred all of its assets to its two stockholders. The only issue in this case is whether the statute of limitations bars the Government from collecting these taxes from its stockholders who are transferees within the meaning of the revenue statute.

This issue depends upon whether the waiver which was executed by the taxpayer's president to extend the time for collecting the above taxes also operates as an extension for collection from the transferees.

The statute provides that a transferee's liability for the tax of a taxpayer shall be assessed and collected in the same manner and shall be subject to the same limitations as in the case of a deficiency in tax imposed on the taxpayer. The applicable provisions as to limitations state that a tax may be collected by a proceeding in court if begun within six years after assessment or if begun within a period agreed upon by the Commissioner and the taxpayer, if such agreement is made prior to the expiration of the original six-year period. Thus, the six-year period may be extended by a waiver such as that in this case and it is conceded that the waiver here did extend the time for collecting the taxes from the taxpayer. The District Court also held that such waiver extended the time for collection from the transferees.

We submit that its decision is correct and is in accord with the rule of construction which requires statutory provisions of limitations to be strictly construed in the Government's favor. Moreover, it has long been the administrative practice to treat any waiver which stops the running of the period of limitation on assessment and collection as to the taxpayer as also suspending the period of limitations as to the transferee. Such practice has been widely approved by the courts in decisions holding that the suspension of the statute as against a transferor works a sus-

pension of the statute as to the transferees whether it is assessment or collection which is involved.

In contending otherwise, the appellant asserts that the waiver here did not extend the time as to the transferees because it was signed by him in his capacity as president of the taxpayer and not in his capacity as transferee. But his contention is not supported by the decisions which show that it is unnecessary to have waivers executed by a transferee where one has been executed by a taxpayer. The liability in both cases is, of course, for the same tax and the taxpayer's waiver stops the period of limitations from running for the time indicated therein. When the appellant here executed the waiver, he of course knew that the taxpayer had distributed all of its assets and that it no longer had anything with which to pay its taxes. Thus, he should have known that he, as a transferee, would be liable for such taxes to the extent of the assets received. At any rate, it is well established that what the appellant did when he executed the waiver for the taxpayer also extended the time for suing him as a transferee and this suit, having been commenced within the time designated in the waiver, is timely as to all of the parties, as the District Court held.

ARGUMENT.

THE DISTRICT COURT CORRECTLY HELD THAT THIS SUIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS AND THAT THE TRANSFEREES ARE LIABLE, TO THE EXTENT FOUND BY THE DISTRICT COURT, FOR THE TAXES ASSESSED AGAINST THE TRANSFEROR-TAXPAYER.

There is no question here as to the liability of the Mission Company for 1942 and 1943 taxes, as found by the District Court, and no question as to the timeliness of this suit, in so far as it concerns that company. Also as the Mission Company became insolvent when it transferred all of its assets in 1944 to its two stockholders, there is now no question that these stockholders became liable, as transferees for the company's unpaid taxes for 1942 and 1943 (to the extent found by the District Court) and must pay the taxes if this suit is timely as to them. Thus, the only issue here is whether the statute of limitations bars the Government from collecting such taxes from the transferees.

Of course, by the time this suit was filed on December 15, 1954 (R. 8), Umberto Dardi, one of the transferees, had died. However, his son Virgil, who is the other transferee, became executor of his father's estate and entered an appearance not only in his individual capacity but also as executor of that estate. (R. 9-13.) Virgil has also been president of the Mission Company and in that capacity executed a waiver on October 21, 1952, extending the period for collection of the company's taxes, either by distraint or by proceeding in court, until December 31, 1956. (R. 45.) In view of such waiver (admitted by appellant to be effective as to the company) the issue here depends

upon whether the waiver is effective to extend the time for collecting these taxes from the transferees. The District Court held (R. 48) that the waiver did extend the time for suing the transferees and therefore concluded that this suit was not barred by the statute of limitations. We submit that the District Court's decision is correct.

Section 311(a) of the 1939 Internal Revenue Code, *supra,* provides that a transferee's liability for the tax of a taxpayer from whom he has received property shall be assessed and collected in the same manner and shall be *subject to the same provisions and limitations* as in the case of a deficiency in tax imposed on the taxpayer. To determine the limitations on collection from a transferee, we must turn to the 1939 Code, Section 276(c), *supra,* which provides that where the assessment of any income tax has been made within the period of limitation applicable thereto,[1] such tax may be collected by a proceeding in court if begun within six years after the assessment of the tax or may be so collected if such suit is begun prior to the expiration of any period for collection which is agreed upon in writing by the Commissioner and the taxpayer before the original six-year period expires. Section 276(c) also provides that the period so agreed upon

[1]While the record does not set out full details as to what transpired between the time that the tax returns of The Mission Company were filed and its taxes were assessed on October 13, 1947 (R. 44-45), the parties have accepted that assessment as timely. Consequently, there is no question here as to the assessment and our discussion will be confined to the statutory provisions relating to collection.

may be extended by subsequent agreements in writing made before the first period expires.

In other words, the six-year period for commencing a suit to collect taxes may be extended by executing a waiver which has the effect of extending the time until the date named therein; and that is exactly what was done here. As we have indicated, the appellant not only admits (Br. 6) that there was such a waiver here but he also admits that it did extend the time in which a collection suit could be filed against the taxpayer-corporation, and that this suit is timely as to that company. But the appellant contends that the waiver is not effective as to him either in his individual capacity or as executor of his father's estate because he signed the waiver as president of the taxpayer-corporation and not as a transferee. The appellant's contention is squarely in conflict with *United States v. City of New York,* 134 F. Supp. 374 (S.D. N.Y.) on which the District Court relied. (R. 19.)

In the *City of New York* case, a waiver extending the time for collecting unpaid taxes had been executed by the taxpayer and suit was subsequently brought against the transferees but within the period designated by the waiver. As here, the transferees in that case argued that the waiver there did not toll the period of limitation as to them because such waiver had been executed by the taxpayer. But in holding that the suit was timely as to the transferees, the Court in that case said (pp. 377-378):

> The waiver of the limitation period contemplated by subdivision (2) of § 276(c) is intended for the benefit of the taxpayer; and in the event of favorable action upon his compromise offer resulting in a reduction of tax, the benefit thereof also inures to the taxpayer's transferee,—to the extent that the Government's potential claim against the transferee is also reduced. Nothing contained in the statute indicates that Congress intended, where a taxpayer consented to extend the limitation period in seeking favorable action upon his offer of compromise, that the Government's time to proceed as against the taxpayer's transferee would be running against it while the matter was under consideration; that the six year rather than the extended period controlled. *Such an interpretation would lead to unwarranted results. It would mean that in extending a benefit to the taxpayer the public fisc would be at a disadvantage in its efforts to pursue assets in the hands of a transferee.* Such an interpretation also would go counter to the settled principle of public policy that "Statutes of Limitation barring the collection of taxes must receive a strict construction in favor of the Government. Limitation will not be presumed in the absence of clear congressional action." (Italics supplied.)

We submit that the above excerpt gives the correct interpretation of the applicable statutory provisions and was properly followed by the District Court here. This is not a novel view but has long been the interpretation given in such cases, and is obviously a logical one. The question of whether a transferor by extend-

ing the time by which suit for collection may be brought against him also extends the time for collecting from the transferee involves the construction of the limitations statute. That construction is one which will apply to all cases regardless of the particular facts involved. The liability of a transferee is secondary rather than primary, and excepting where it is shown that it would prove an idle gesture, the Government must first exhaust all remedies against the taxpayer-transferor before holding the transferee liable. *Commissioner v. Oswego Falls Corp.,* 71 F. 2d 673, 676 (C.A. 2d), *Swan Land and Cattle Co. v. Frank,* 148 U.S. 603. Hence it is clear that the appellant's contention here would render useless the very purpose for which Congress has authorized waivers for extending the statute of limitations; and such a construction would prove detrimental to a transferor and to his transferee as well as disadvantageous to the Government. But as the court said in the *City of New York* case (p. 378)—

> Absent congressional enactment the collection of taxes by the Government is subject to no time limit. Congress was not required to fix any period of limitation. In fixing a period of repose and in authorizing its extension upon an agreement by the taxpayer it had the clear right to provide that the extended period shall bind both the taxpayer and his transferees.

In contending that the *City of New York* case is based upon a misunderstanding of the law, the appellant objects (Br. 11) particularly to the statement in

the above excerpt that the statute of limitations are to be strictly construed in favor of the Government and asserts that such statement is contrary to the well settled law but as the decisions of this Court and of other courts show it is the appellant who is in error. Some years ago this Court stated in *Pacific Coast Steel Co. v. McLaughlin,* 61 F. 2d 73 affirmed, 288 U.S. 426, that the statute of limitations barring collection of taxes which are due and unpaid must receive a strict construction in favor of the Government and that limitations will not be presumed in absence of clear Congressional action. Subsequently that principle was reiterated by this Court in *McCarthy Co. v. Commissioner,* 80 F. 2d 618, a case involving a waiver extending the time for assessment. The same principle was approved in *Du Pont de Nemours & Co. v. Davis,* 264 U.S. 456, 462, and in *Loewer Realty Co. v. Anderson,* 31 F. 2d 268 (C.A. 2d), certiorari denied, 280 U.S. 558. In arguing against this principle, the appellant cites (Br. 11) *Bowers v. N.Y. & Albany Co.,* 273 U.S. 346, which was decided several years before the *McCarthy* case and is not actually in conflict with it. While the *Bowers* case (which involved a collection by distraint) recognized the rule quoted in the *City of New York* case, it also indicated that tax laws are to be interpreted liberally in favor of the taxpayers. But since deciding the *Bowers* case, the Supreme Court has been active in stopping attacks based on the statute of limitations which have been made following its ambiguous statement in that case. This was pointed out in Section 57.02 of 10 Mertens, Law of

Federal Income Taxation (1948) where it was stated that the rule we refer to has been scrupulously adhered to in the large majority of cases.[2]

But as we have indicated, there is more to support the District Court's decision here than the rule of construction we have referred to. Indeed, it has long been the administrative practice to consider anything which stops the running of the period of limitation on assessment of the taxpayer and on collection from him (whether by waiver or by specific statutory provision on limitation) as also stopping the running of the period of limitation against the taxpayer's transferee. And such practice has been approved by this and other courts in many cases. This was clearly indicated in *First Nat. Bank of Chicago v. Commissioner,* 112 F. 2d 260 (C.A. 7th), certiorari denied, 311 U.S. 691, where it was said (p. 261):

> We agree with the reasoning of these cases and in the conclusion that suspension of the statute as against the transferor works a suspension of the statute as to the transferees, and, as held in

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[2]In indicating his approval of the above rule, Mertens states (supra, p. 164):

> In perhaps no other single phase of the income tax acts would a tendency to favor the taxpayer involve inherently such dangerous potential consequences to the public treasury. Errors of administration in the early years and attempts by Congress to overcome the effects of court decisions or to legislate the answer in later acts to problems arising under earlier acts have created questions of startling proportion in terms of the amounts involved. The Supreme Court has been active in stopping attacks predicated on the statute of limitations following its early decision in the New York & Albany Lighterage case [273 U.S. 346]. Recently there has been a noticeable tendency in many of the cases to cut through the technical issues involved and to rely upon the doctrine of estoppel.

> the *Sanborn* case, that the suspension of the statute as to liability asserted against the executors works likewise a suspension of the statute as to the transferees. * * *

In reaching that conclusion the Seventh Circuit cited similar decisions by the Court of Claims and three other Courts of Appeals including this Court's decisions in *Commissioner v. Gerard,* 78 F. 2d 485, and *California Iron Yards Corp. v. Commissioner,* 82 F. 2d 776, certiorari denied, 299 U.S. 553. The Tax Court has also long been of the same opinion. See *Gatto v. Commissioner,* 20 T.C. 830; *Rite-Way Products v. Commissioner,* 12 T.C. 475; and *Menger v. Commissioner,* 17 B.T.A. 998.

As appellant argues here (Br. 13-14) that there are significant differences between the statutory provisions relating to assessment and those relating to collection and that these differences support his contention, we call attention to the waiver which was filed by the taxpayer-corporation in the *Rite-Way* case. As to this, the Tax Court said (pp. 478-479):

> The petitioners concede * * * that the period of limitations for assessment and collection against *Rite-Way* was extended by proper consents filed by *Rite-Way.* It is also clear that the liquidating distributions were complete and thereafter *Rite-Way* was without any funds with which to pay the deficiencies and interest. The petitioners contend, nevertheless, that the period of limitations for assessment against and collection from the transferees expired within one year after the expiration of the original period of limitations

> with respect to the taxpayer; that is, that the consents had no effect in so far as the transferees are concerned. *This question was decided long ago against the petitioners.* The statute provides that the period of limitations for assessment of the transferee liability in the case of initial transferees of the property of the taxpayer shall be within one year after the expiration of the period of limitations for assessment against the taxpayer. Sec. 311 (b) (1). *That means the original period of limitation for assessment against the taxpayer as properly extended by consents.* * * * (Italics supplied.)

Thus, it will be seen that the statute of limitations was suspended there by a waiver or consent executed by the taxpayer-corporation and that the Tax Court held that such waiver did extend the time for assessing the transferees. In other words, the time for assessing the transferees was not one year beyond the original period, as the transferees argued there, but one year beyond the original period as extended by the taxpayer's waiver. We submit that the same principle is applicable to waivers which are executed, as in this case, by the taxpayer to extend the time for collection of the tax.

Consequently, the appellant is in error in asserting (Br. 13) that the *City of New York* case (on which the District Court relied here) is "based upon an unsound analogy between action extending the time for *assessment* of tax and agreements extending the period for *collection.*" What the appellant appears to be referring to is the provision in the 1939 Code,

Section 272, which prohibits the Commissioner from making an assessment for a designated time after a notice of deficiency is mailed to the taxpayer and a petition for redetermination is filed with the Tax Court. It is true that such procedure automatically postpones any assessment against a transferee but it is also obvious that it extends the time for collection as well, and it is not material that Section 272 does not state that collection will be affected by such action. The important thing to note here is that a taxpayer is authorized by Section 276 to execute waivers and that these may postpone the time for collection as well as for assessment. Furthermore, such waivers are equally effective as to the taxpayer's transferee.

That this is so was clearly indicated in *Lucas v. Hunt,* 45 F. 2d 781. (C.A. 5th). There a waiver was signed by Hunt as the president of the taxpayer-corporation. The waiver was slightly more than three years after the corporation was dissolved and after its assets had been transferred to Hunt and others. The Commissioner assessed Hunt as transferee within the period designated in the waiver and the latter contended that assessment was barred by the statute of limitations. Among the arguments advanced by Hunt was the one that the waiver was not valid since under Texas law he had no authority to act for the dissolved corporation when the waiver was executed. But the Fifth Circuit held otherwise, stating that (p. 782):

> We are of opinion that Hunt by signing the waiver estopped himself to question its validity,

> with the result that he was bound to respond to the assessment to the extent of funds in his hands which belonged to the dissolved corporation taxpayer. * * *
>
> The waiver was executed before the assessment was barred; without it the commissioner in the performance of his duty would have made the assessment within the statutory period. The very purpose he had in mind in requiring an extension of time was to make an assessment after the statutory period of limitation had run. * * *

The same conclusion was also reached in *Benoit v. Commissioner,* 238 F. 2d 485 (C.A. 1st); *Lloyd v. Commissioner,* 29 B.T.A. 74. Also cf. *Stearns Co. v. United States,* 291 U.S. 54, 61.

We submit that the Government's position is even stronger than it was in the *Hunt* case for the appellant here does not argue that he had no authority to execute the waiver on behalf of the taxpayer-corporation. Instead, appellant admits (Br. 6) that the waiver is effective as to his company and so concedes its validity.[3] But appellant objects to the waiver because it made no reference to any transferee, and because he did not execute it in his individual capacity or as executor of his father's estate. In this connection he states that he had no reason to suppose that he was

[3]In view of this concession, we think it is unnecessary to discuss California law as to corporations in the process of dissolution. However, in view of this Court's statement as to the California corporation law in *A B C Brewing Corp. v. Commissioner,* 224 F. 2d 483, and in *California Iron Yards Corp. v. Commissioner, supra,* we think it is evident that the appellant as president of the Mission Company could take any step necessary in discharging such obligations as taxes and did have authority to execute the waiver.

extending the time against himself individually or as executor and explains that "if he considered the matter at all he could reasonably have concluded that the Government intended to look only to the corporation for the payment of the taxes in question". (Br. 7.) It seems incredible that appellant would make such an assertion for he was in a position to know the facts when he signed the waiver and the facts are that he and his father had already distributed all of the assets to themselves and their corporation had nothing with which to pay its taxes. Under these circumstances, it must have been obvious to the appellant that he and his father would be held liable as transferees. At any rate it is well established that waivers like the one here do stop the running of the period of limitations not only as to the taxpayer but also as to its transferees.

Appellant's position is obviously different from that of the person who executed the waiver in *Commissioner v. Bryson,* 79 F. 2d 397 (C.A. 9th), on which appellant relies. (Br. 8.) The waiver in that case was signed by a former secretary of the taxpayer-corporation. Such waiver was also accompanied by a letter from an attorney explaining that the former officers could not legally act for the corporation which had been out of business for about five years and that the former secretary who signed the waiver was not acting as the actual secretary. This Court held that the waiver in that case was a nullity both as to the corporation and as to the transferees. In reaching its conclusion, this Court said (p. 401):

When the respondent informed the Commissioner that he would not presume to act for the corporation, when the document was signed only by a "former officer," and when it failed to bear the corporate seal, the Commissioner, as a reasonable man, should have been put on notice that, both in fact and in law, he had before him an abortive paper, binding neither corporation nor individual.

Since the waiver of 1924 was a nullity, the period of limitations ran in favor of the corporation, and therefore in favor of the respondent as alleged transferee.

Appellant also refers (Br. 12) to *United States v. Markowitz,* 34 F. Supp. 827 (N.D. Calif.), which was cited in the *City of New York* case with approval. As the appellant indicates, the waiver there was executed by the transferee and in that respect differs from the facts here. However, the *Markowitz* case contains an excellent statement of the general principle applicable here. In that case, the transferee signed two waivers but argued that no effect could be given to the second one because it was executed after the time allowed by the statute, i.e., six years after the assessment of the tax. But in holding that both waivers were timely, the court there pointed out that the provisions of Section 276(c) apply to a transferee as well as to a taxpayer and stated that we may not assume that Congress intended to create a shorter statutory period for the commencement of an action against the transferee than is provided for the commencement of the action against the taxpayer himself. We submit that

is a correct statement of the law applicable here. The tax liability which is imposed on the transferee is the same as that imposed on the taxpayer and when the latter acts through its officers to extend the period for assessment and collection of such tax, such waiver stops the running of the statute of limitations as to the transferee as well as for the taxpayer.

CONCLUSION.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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